Supreme Court, U.S.
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No. 87-1731

In The
Supreme Court of the United States
October Term, 1987

—o—

CARSON PIRIE SCOTT AND COMPANY,
Petitioner,

v.

WILLIAM M. LACEY,
Respondent.

—o—

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

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TABLE OF CONTENTS

Page

Statement of the Case 1

Summary of Argument 12

Introduction 13

Argument 13

I. & II. THE THIRD CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISIONS ON BURDEN OF PROOF, AND THE EVIDENCE AS A WHOLE SUPPORTS THE JURY VERDICT. 13

III. BECAUSE CARSON DID NOT REQUEST THE TRIAL JUDGE TO MAKE AN EQUITABLE DETERMINATION CONCERNING "FRONT PAY", AND BECAUSE CARSON DID NOT OBJECT TO THE JURY INSTRUCTIONS ON THIS POINT, THE ISSUE HAS BEEN WAIVED. REGARDLESS, THE JURY'S AWARD OF FUTURE LOST EARNINGS IS CLEARLY SUPPORTED BY THE EVIDENCE. 23

IV. BECAUSE CARSON DID NOT OBJECT TO THE JURY INSTRUCTIONS CONCERNING MITIGATION, THIS ISSUE HAS BEEN WAIVED. REGARDLESS, THE JURY'S DETERMINATION THAT LACEY DID NOT FAIL TO MITIGATE DAMAGES IS CLEARLY SUPPORTED BY THE EVIDENCE. 26

Conclusion 30

TABLE OF CITATIONS

Page

CASES

Berndt v. Kaiser-Aluminum & Chemical Sales, Inc., 789 F.2d 253 (3d Cir. 1986) 22

Black v. Stephens, 662 F.2d 181 (3d Cir. 1981) 19

Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3d Cir. 1987) 16

Dace v. A.C.F. Industries, Inc., 722 F.2d 374 (8th Cir. 1983) 21

Fireman's Fund Ins. Co. v. Videfreeze Corp., 540 F.2d 1171 (3d Cir. 1976) 20

Ford Motor Co. v. EEOC, 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982) 28

Grecco v. Spang & Co. (I), 527 F.Supp. 978 (W.D. Pa. 1981) 16

Grecco v. Spang & Co. (II), 530 F.Supp. 782 (W.D. Pa. 1982) 16

Maxfield v. Sinclair International, 766 F.2d 788 (3d Cir. 1985) 23, 24

Spagnuolo v. Whirlpool Corp., 717 F.2d 114 (4th Cir. 1983) 30

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) 12, 13, 15, 16, 17, 23

Wehr v. Burroughs Corp., 619 F.2d 276 (3d Cir. 1980) 30

Zegan v. Central Railroad Co. of New Jersey, 266 F.2d 101 (3d Cir. 1959) 20

STATUTES

29 U.S.C. § 623(a) 19

42 U.S.C. § 2000e 13

RULES

Federal Rules of Civil Procedure, Rule 51 27

STATEMENT OF THE CASE

William M. Lacey ("Lacey") was a salesman for approximately 32 years before being hired by Carson Pirie Scott ("Carson") on November 1, 1974 (Joint Appendix, hereafter referred to as "J.A.", 56-57). The retirement age at Carson was 70 years of age, and Lacey did intend to work until he reached 70 (J.A., 57). At the point of his dismissal on May 16, 1981, he was 62½ years of age (J.A., 57-58).

Lacey's income from 1974 through 1981 (J.A., 60-61; see also Plaintiff's Exhibit 37 at J.A., 781) was as follows:

1976—$ 10,857.88	1979—$ 22,926.43
1977—$ 14,764.44	1980—$ 28,136.32
1978—$ 19,117.37	1981—$ 13,367.53

From 1976 through 1980, Lacey exceeded his sales quota (J.A., 60-62, 110). Sales quotas were established by Carson's headquarters in Chicago, and salesmen were informed in writing (J.A., 61, 345). Quotas were based on the previous year's performance plus a 9% increase (J.A., 86, 114-115, and see e.g. Plaintiff's Exhibit 17 at J.A., 749).

Lacey's gross sales (J.A., 62) were as follows:

1976—$341,270.00	1979—$ 983,000.00
1977—$724,000.00	1980—$1,215,000.00
1978—$796,000.00	

In 1980, Lacey's sales quota was $1,100,000.00, which was based on his 1979 sales performance plus 9% (J.A., 115-116). His actual sales for 1980 were $1,215,000.00 (J.A., 115-116), or 110% of his quota (J.A., 616-617). Company officials admitted that Lacey was the top salesman in Carson's soft carpet division of the Western Pennsylvania region in 1980 (J.A., 652).

In January, 1980, Mr. Lacey's standing in the entire company for sales against quota was number eight of

twenty-two salesmen in his category; in the Pittsburgh region (covering Western Pennsylvania, Ohio and West Virginia (J.A., 74)), he was number one of five soft carpet salesmen (J.A., 71-72, 75). In February, 1980, he was number nine in the company in his category, and number one in Pittsburgh (J.A., 73). In March, he was tenth in the company and first in Pittsburgh (J.A., 73). In April, he was number eight in the company and first in Pittsburgh (J.A., 73). In May, he was sixth in the company and first in Pittsburgh (J.A., 73). In October, Lacey was ranked fifth in the company and first in Pittsburgh (J.A., 75). In November, 1980, he was again number five in the company and number one in Pittsburgh (J.A., 75). See also Plaintiff's Exhibit 18 (J.A., 756-761). These results by Lacey were achieved despite some of his accounts being transferred to another salesman in 1980 (J.A., 512-518).

In 1980, between Christmas and New Year's Day, Lacey was asked to attend Carson's awards dinner for sales in that year. He was commended for his performance, and presented with a plaque, Plaintiff's Exhibit 26, which was inscribed as follows:

> "Carson Pirie Scott & Co. Million Dollar Club, 1980. William M. Lacey is hereby recognized as a member of the Million Dollar Club by achieving One Million Dollars in sales during the designated 12-month period. His membership indicates outstanding sales ability, knowledge of the floor covering industry, and awareness of the needs of the customer. In compiling his record, he has made a notable contribution to the growth of our firm. He has attained the goal of every salesman associated with the Floor Covering Division, and of him we are justly proud." (J.A., 64)

The plaque was signed by Dean McKinney, Executive Vice President of the Division (J.A., 64, 617-618). Carson had

also presented Lacey with an award in 1977 (Plaintiff's Exhibit 40), entitled "Meritorious Sales Award First Place, presented to William M. Lacey, 1977, for distinguished achievement in carpet sales" (J.A., 132).

Lacey also was given a ring by Carson to demonstrate the achievement of a million dollars in sales (Plaintiff's Exhibit 27). The ring was inscribed: "Million Dollars Sales Club"; it was delivered to Lacey in January, 1981 (J.A., 65-66).

Approximately four and one-half months later, Lacey was fired. Between January and mid-May, 1981, he was only able to work for two and one-half months due to an injury sustained while working (J.A., 63). Specifically, Lacey was injured on February 10, 1981, returned to work on April 6, 1981 and was fired on May 16, 1981 (J.A., 85). Plaintiff's Exhibit No. 34, a report from Dr. Duffy, M.D., dated April 3, 1981, indicates that Lacey's injuries were a sprained spine, sprained lumbar spine area and muscle spasms. Lacey was permitted to return to work on April 6, 1981, with some restrictions on heavy lifting, bending and stooping, i.e., "light duty" (J.A., 88-90, 622-624). During his convalescence, Lacey filed a disability claim under workman's compensation, which was honored (J.A., 85, 163).

While on disability, Lacey wondered if he would ever be healthy enough to return to work, so he began to look around for income producing areas. He called the Social Security Office and was told to appear with certain information to discuss his options. He went with the intention of learning what his income would be *if* he retired or was unable to return to work (J.A., 87-88). After being told it would take approximately three months to process

his claim, he gave a date of July 1st for the beginning of Social Security benefits (J.A., 89-90). Lacey continuously emphasized at trial that he only made an inquiry regarding Social Security benefits; he did not intend to apply for them (J.A., 163-164). Also, a Social Security office representative testified that an individual always has the right to withdraw an application, and if he returns to work after being off for a period of time, he may be eligible to receive benefits for the time he was unemployed (J.A., 410).

The sales quota for 1981, given to Lacey on May 14, was $1,315,000.00, approximately 9% or $115,000.00 more than he had produced in 1980 (J.A., 81, 648). He was advised of this quota via a May 11, 1981 letter from Carson. See Plaintiff's Exhibit 17 (J.A., 749, et seq.), entitled "Subject 1981 Meritorious Sales Quotas"; the first paragraph of the letter says:

> "Your sales quotas are based on last year's performance plus a 9% increase reflecting the division's sales budget."

It was customary for Carson to add 9% over the prior year's sales in order to set a quota for the next year (J.A., 76-77).

In the month he was fired, Lacey, for the only time in 1980 or 1981, was not first in his district. A Mr. Hartley was ahead of him by a percentage point or two, and a Mr. Pschirer was the next salesman after Lacey. Neither Hartley nor Pschirer were fired (J.A., 86-87). No one in the Pittsburgh region had reached quota in the first five months of 1981, but the only one fired was Lacey (J.A., 696-697). Carson's manager told Lacey he was being terminated due to "lack of sales and sales performance" (J.A., 545-546). The termination form used by Carson, as it pertains to Mr. Lacey (see Plaintiff's Exhibit No.

32, J.A., 94 and 763) lists the reason for termination as "substandard production", but also indicates that Lacey's rating is "satisfactory" (J.A., 95, 763). Lacey said that prior to May 16, 1981, no one in a supervisory capacity in the company had told him that his production was substandard (J.A., 95).

Concerning Lacey's performance as a salesman, Patsy Macioce testified that he had been employed at Hahn Furniture Company, where he was the department manager (J.A., 236-237). Carson was the supplier to Hahn's, and Lacey was their representative (J.A., 237-238). "He served me well" Macioce said of Lacey, who customarily called on Hahn's every 2 to 3 weeks the entire time he dealt with the store (J.A., 239-240).

William R. Pratt, Vice President in charge of the carpet department for Graffam Floors in Pittsburgh, testified that even in 1986 (when trial occurred) a salesman who sells a million dollars of product accomplishes a "good milestone", and such a person would be a "desired employee" (J.A., 283).

As a result of his dismissal, Lacey was deprived of substantial income and benefits. His projected lost salary from termination in 1981 to retirement at age 70 in 1988 was $329,200.00 (J.A., 116-117). As of May 16, 1981, he lost full medical and hospitalization coverage (J.A., 91, 117), pension benefits and a $5,000.00 life insurance policy (J.A., 91, 132-134, 363).

Prior to being fired, Lacey was not warned or advised in any fashion that his performance was not satisfactory (J.A., 137). On the contrary, he was frequently lauded for his work. In addition to the awards in December and January, Lacey received a memorandum dated January 26, 1981 from Jack Broderick, a Carson sales manager, re-

ferring to a meeting between them on January 22, 1981 (Plaintiff's Exhibit 8), which stated:

> "My initial reaction to our meeting was extremely good. We accomplished some good, concrete direction for both of us in Allegheny County. In order that we might both see the progression being made in the areas discussed, I feel we should have an individual meeting of this type every two months. By calling on the six accounts that we scheduled for February together, I believe we can increase their volume substantially. It is good to hear that you have already signed 10 ASP programs of which five are purchasing the Color Palace rack. Again, I am sure, with your goal of 40 to 50 ASP, 81 dealers and 20 to 25 Color Palace racks being sold in your territory, the sales year will get off to the type of start we both know is necessary to obtain the sales quota established for Allegheny County." (J.A., 138-139)

Lacey and all who testified for Carson agreed that this memorandum was upbeat and motivational, and not derogatory or in the nature of a reprimand (J.A., 139, 372, 401, 620-621).

On March 9, 1981, Mr. W. H. Lawson, Vice President at Carson, authorized Lacey to purchase a new automobile during that year (J.A., 78; Plaintiff's Exhibit 12; and J.A., 132, 166-167). Later, Lawson agreed to give Lacey an extension of two months to make the last payment on Lacey's 1978 vehicle which had low mileage and was of a size appropriate to his job (J.A., 78-79, 168-169). In April 1981, Lacey's manager informed him that he had to purchase a car under his agreement with Carson (J.A., 543). During this period, Lacey was not told of any dissatisfaction on Carson's part.

Plaintiff's Exhibit 29 entitled "Personnel Policies and Procedures-Termination of Employment" (J.A., 96, 762) indicates that employment at Carson will terminate for all associates at age 70. This document goes on to say:

"Except for willful misconduct, proven dishonesty, or failure to meet the Conditions Employment, no Associate will be released from the Company without having gone through the following steps:

1. Verbal discussion of the problem by the immediate supervisor and the Associate. The supervisor will document, sign and date the discussion. (Depending upon the severity, step 1 may be eliminated).

2. If the problem persists, a Corrective Interview (Form CPS 1929) will be conducted. The Corrective Interview will be given by the immediate supervisor in the presence of the next line manager and will become a matter of written record to be signed by the supervisor and manager.

3. If there is no improvement within the time frame designated on the Corrective Interview form, a Warning Interview (Form CD 19/45-776) will be given by the immediate supervisor and the Personnel Representative, to be signed by the Associate.

4. If there is no improvement within the time frame designated on the Warning Interview form, termination will follow.

The disciplinary policy shown above is intended to set the guidelines for the fair treatment of Associates."

Concerning number 1, Lacey said he never had any discussion or meeting with a supervisor during which he was reprimanded and it was reduced to writing (J.A., 97). As to number 2, no such interview took place. Regarding number 3, Lacey never had such a "warning interview", nor was such a form or writing presented to him or signed by him (J.A., 98). Overall, no interviews were conducted with Lacey prior to his termination, and he was never warned of alleged poor sales production (J.A., 98). Car-

son acknowledges that there are no written evaluations or reports of Lacey's performance with the company (J.A., 130). The only possible exception is the above referred-to memorandum of January 26, 1981, which conveys that Carson is pleased with Lacey's efforts. No written reprimands or expressions of dissatisfaction were ever issued to Lacey (J.A., 365, 608). Lacey was not advised that he would be fired if he did not perform his job in a particular way (J.A., 660-661).

Lacey looked for work after being dismissed in May, 1981. He made telephone calls to several mills which manufactured carpet. He was able to obtain at least one interview, but he did not get the job—it was implied that his age was a factor in his not being hired (J.A., 108). Lacey said he also approached the local distributors, but he was not hired because there was no available position (J.A., 108).

Lacey subscribed to two trade journals for the purpose of looking for work; one was called "Modern Floor Covering", and the other was entitled "Floor Covering Weekly" (J.A., 108-109). He consistently reviewed the classified sections in those papers from the time he was discharged "until beyond the point where it was worth even paying any attention to it anymore" (J.A., 109).

Lacey called every local important account (J.A., 109). He said:

> "I didn't just contact them one time. I consistently called them, from time to time, throughout the period, beyond the time I even started receiving social security checks. It got to the point I was just plain discouraged. I didn't feel there was a possibility of anything happening. These people that I knew didn't indicate to me I was too old. They thought I was fine and was a good salesman and I should be valuable to

somebody, but they didn't know anybody that was hiring anybody." (J.A., 109)

In the early 1980's, the Pittsburgh area was in an economic down trend, and businesses in general were not doing too well (J.A., 110).

Lacey also tried—on three different occasions—to have Carson reinstate him to his job (J.A., 110).

Robert O. Bierly, who has been in the carpet business since the 1970's, testified at trial that he became familiar with Lacey when he called on Bierly's Verona, PA store as a representative of Carson (J.A., 228). Bierly said that Lacey, after being fired from Carson Pirie, contacted Bierly several times for the purpose of finding work (J.A., 230). The first time was immediately upon being discharged (J.A., 230). Afterwards, he called at regular intervals (J.A., 230). Bierly even made efforts on behalf of Lacey. He inquired of representatives of other distributors as to whether there were any openings, but he was unsuccessful. Bierly said: "There wasn't anything available in the industry, especially for an older man" (J.A., 231); he simply was not able to find any work for a soft carpet salesman with Bill's particular ability (J.A., 232). Bierly said that Lacey told him in the fall of 1981 that he was making efforts to find a job, and that he had made many contacts in the industry; he was following up on one or two particular leads, but he hadn't been able to find anything (J.A., 233-234).

William R. Pratt testified that he is Vice President in charge of the carpet department at Graffam Floors in Pittsburgh, a carpet distributor (J.A., 279). He has been in the carpet business since 1946 (J.A., 279). His business serves Western Pennsylvania, the Cleveland and Youngstown, Ohio areas, and West Virginia (J.A., 279-

280). Sometime in 1981, approximately September, Pratt and Lacey had a conversation, and Lacey asked whether they could meet and discuss whether Graffam might have employment for Lacey. Pratt did not ask Lacey for a resume (J.A., 286). Lacey later telephoned Pratt (J.A., 286); but Graffam Floors did not have a position at that time (J.A., 280).

Since 1981, Pratt testified his company has not hired any new soft carpet salesmen in the Pittsburgh area (J.A., 280). Pratt explained that a distributor salesman (like Lacey) is a particular breed of salesman, and the availability of jobs in the Greater Pittsburgh area had been greatly lessened by the loss of three rather large distributors and most of the others having a rather stable work force (J.A., 281).

Lacey finally abandoned his search for employment in 1983, since "there was no point in pursuing it further. I was getting nowhere. I constantly maintained contact with these people, not on a daily basis, but erratically, I would call them—I didn't want to pester them to death—and ask them if they knew anything" (J.A., 174).

Lacey repeatedly said during the trial that he had no intention, at any time, of retiring from Carson before age 70 (J.A., 225). He wanted to work (J.A., 186), and he was able (J.A., 92). After he left the employment of Carson, he attempted to contact all the sources of whom he personally had knowledge in an effort to find work (J.A., 225-226), but he was told "there's nothing available" (J.A., 176-177).

Timothy Burdon was hired by Carson approximately five months before Lacey was injured, and after Lacey was fired, Burdon took his place selling soft carpet in Allegheny County (J.A., 66, 302). Burdon was 43 years of

age (J.A., 67, 308), and he was a salaried employee, while Lacey was on commission (J.A., 68, 310).

In his first full year, 1982, Burdon only sold $1.1 million, compared to Lacey's more than $1.2 million in 1980 (J.A., 306). In 1984, Burdon sold $1.6 million, but when this figure is reduced by the 15% increase in carpet prices, Burdon admitted there is not much difference between his $1.383 million net and Lacey's $1.2 million four years earlier (J.A., 320). Burdon did not equal Lacey's sales until he worked three and one-half years for Carson. When asked on cross-examination, "You worked there '81, '82, '83, '84, until you caught up with him", Burdon responded: "I agree" (J.A., 320).

Frank R. Rodzwicz, Carson's district manager through September 1981, who was instrumental in firing Lacey (J.A., 539-540), said that Burdon "was performing admirably in the new position" (J.A., 571). John T. Broderick, Carson's sales manager in Pittsburgh after December 1979, opined that Burdon did an "excellent job" (J.A., 394). Broderick acknowledged that Burdon's sales in 1982 were less than a million dollars, while Lacey's sales in 1980 exceeded 1.2 million dollars (J.A., 397).

None of the Pittsburgh district soft carpet salesmen reached or exceeded their respective 1981 sales quotas. In 1981, none of them met Lacey's sales for 1980 (J.A., 92-93).

Ronald Sherwood, a soft carpeting distributor in the Scottsdale, Arizona area, testified that he was hired by Carson in the Spring of 1974 as the carpet sales manager of the Pittsburgh district (J.A., 247-248). He hired Lacey who was 55 or 56. His other employees were Warren McWilliams (about 50), Harry Nagle (in his fifties), Jimmy Wilkes (45) and Frank Hartley (mid to late thir-

ties). Sherwood was 45 years old (J.A., 248-249). Sherwood said that when he started with Carson, he inherited a situation where the company had lost money in Pittsburgh for 22 consecutive years (J.A., 249-250). Within a year or two, the division became profitable (J.A., 250). Nevertheless, Sherwood said that "he was taken to task" by Pat Shaw, Carson's national sales manager; he was admonished because he had collected a group of people Shaw referred to "as over-the-hill, retreaded, has-beens," (J.A., 250-251, 261-262). Shaw "didn't possibly see how this group of people was going to do a job here for Carson Pirie Scott" (J.A., 251).

Sherwood said Lacey "was a doggone good salesman, knowledgeable, dependable; in fact, I looked to Bill for input" (J.A., 251). Sherwood left Carson in April or May of 1979, after Dean McKinney, Carson's Executive Vice President, told him it was time for him to leave the company (J.A., 252-258). Sherwood was replaced by Rodzwicz, who was in his middle twenties (J.A., 259).

Between 1979 and 1981, none of the Pittsburgh area salesmen went on pension (J.A., 130).

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SUMMARY OF ARGUMENT

The decision below does not conflict with the burden of proof requirement set forth in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). As petitioner conceded at trial, a plaintiff may, but need not, present rebuttal evidence. Here, the evidence as a whole supports the jury verdict that Lacey was a victim of age discrimination on the part of Carson.

Carson did not ask the trial court to equitably determine whether Lacey was entitled to future lost earnings.

Nor did Carson object to the instructions allowing the jury to make such an award. Consequently, Carson's present argument has been waived. Nevertheless, the evidence clearly supports the jury's award of "front pay."

Carson also waived its present argument regarding mitigation due to its failure to object to the applicable jury instructions. Nevertheless, the evidence clearly supports the jury's finding that Lacey did not fail to mitigate his damages.

INTRODUCTION

In this case, there are no "special and important reasons" for the granting of the Petition for Writ of Certiorari. In fact, the issues raised in the petition have all been properly ruled upon in the lower courts or they have been waived by the petitioner.

ARGUMENT

I. & II.

THE THIRD CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISIONS ON BURDEN OF PROOF, AND THE EVIDENCE AS A WHOLE SUPPORTS THE JURY VERDICT.

A.

The Decision Below Is Not In Conflict With An Applicable Decision Of This Court.

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), this Court thoroughly describes the "basic allocations of burdens and order of presentation of proof in a . . . case alleging discriminatory treatment" in the related and parallel setting of Title VII (42 U.S.C. § 2000e et seq.):

> "First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff suc-

ceeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

. . .

It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext

. . .

The plaintiff retains the burden of persuasion. He now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination. He may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See *McDonnell Douglas*, 411 U.S. at 804-805, 36 L.Ed.2d 668, 93 S.Ct. 1817." 450 U.S. at 252-256 (footonotes omitted).

In the instant case, the Third Circuit wrote the following in its Memorandum Opinion concerning the procedures for an action under the ADEA:

> "A plaintiff may recover only if he proves by a preponderance of the evidence that age was a determining factor in his termination and he may do this by direct or circumstantial evidence. If a plaintiff in his case meets this burden, the defendant, to avoid a motion for a directed verdict, must articulate and support by evidence a legitimate, nondiscriminatory reason for its action. If the defendant does this, the plaintiff then has the burden to prove discriminatory animus in the defendant's actions, thus overcoming the defendant's claim of justification. The plaintiff, however, may meet his burden either in his case in chief or by rebuttal evidence." (A-5, A-6)

This statement of the law is not incorrect, and it does not conflict with *Burdine* or any other case decided by this Court.

While referring to the frequently mentioned footnote 10 of *Burdine*, Carson only recites a single sentence of it (Petition, 26-27). Quoted in its entirety, it says:

> "10. See generally J. Thayer, Preliminary Treatise on Evidence 346 (1898). In saying that the presumption drops from the case, we do not imply that *the* trier of fact no longer may consider *evidence previously introduced by the plaintiff to establish a prima facie case.* A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence *and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.*" 450 U.S. at 255, n.10 (emphasis added)

Burdine thus confirms, in no uncertain terms, that the plaintiff may, *but need not*, present rebuttal evidence. He must have the opportunity to do so. However, his election not to present rebuttal evidence cannot form the basis for a judgment n.o.v. against the plaintiff. He may instead, without the risk of adverse judicial ruling, elect to stand on a) his case in chief, b) his cross-examination of defense witnesses, c) his closing argument and/or d) the court's instructions to the jury.[1]

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[1] See also: *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 898 (3d Cir. 1987):

> "Because Spencer [defendant-employer] proffered evidence of a legitimate non-discriminatory reason, the issue before us is whether the record as a whole contains sufficient evidence from which the factfinder could infer that the defendant was guilty of intentional discrimination. Because Chipollini [plaintiff-employee] offered no direct evidence of a discriminatory motive, questions regarding intent and its manifestations are, at this point, subsumed under the inquiry into employer pretext."

Grecco v. Spang & Co. (I), 527 F.Supp. 978, 982 (W.D. Pa. 1981):

> "The defendant . . . argues that even if the plaintiff . . . demonstrated his ability to make out a prima facie case, the evidence of a bona fide business justification for the plaintiff's discharge required the plaintiff to *respond with additional evidence* that the defendant's business justification was a pretext and since plaintiff failed to do this defendant is entitled to summary judgment. However, as the Court held in *Burdine, supra*, a satisfactory explanation by defendant does not require the plaintiff to come forward with additional evidence attacking the explanation, it merely 'destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence . . .' and joins the issues for resolution on all of the evidence by the trier of the fact." (emphasis in original)

Grecco v. Spang & Co. (II), 530 F.Supp. 782, 794 (W.D Pa. 1982):

> "We believe that the fallacy of the defendant's position lies in its contention that once it has produced evidence, whether it be evidence to rebut the elements of the prima facie case or to proffer a business justification defense, the law requires that the plaintiff move forward and present additional evidence to counter the defendant's case. If the defendant tenders evidence that challenges the existence of one of the elements of a prima facie case,

Furthermore, Carson's concession at trial and failure to object at trial to the lawful procedure of not requiring the plaintiff to present "rebuttal" constitutes a waiver of Carson's present argument to the contrary (Petition, 6-7, 30 et seq.)[2]

In this case, Lacey merely elected to take one of two legally permissible courses. He presented no rebuttal evidence, and chose instead to rely on his case-in-chief, his cross-examination of the defendant's witnesses, his closing argument and the jury instructions. By conceding, at trial, that this is a legally permissible course, Carson waives its claim that Lacey must present rebuttal evidence. Moreover, in light of principle, authority and simple legal tradition in permitting but not requiring rebuttal, the plaintiff in an age discrimination case may, but need not present rebuttal evidence.

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the defendant only has created a genuine issue of material fact which must be resolved by the fact finder. Cf. *Rhodes v. Robinson,* 612 F.2d 766 (3d Cir. 1979); *Perks v. Firestone Tire and Rubber Co.,* 611 F.2d 1363 (3d Cir. 1979); *See generally,* 6 Moore's Federal Practice § 56.15 [1.-0] (2nd ed. 1981). And in the event that the defendant presents evidence of a legitimate business justification, the plaintiff must be given an opportunity to cross-examine the defendant on this point before the fact finder. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 255 fn. 10, 101 S.Ct. 1089, 1095 fn. 10, 67 L.Ed.2d 207, 216 fn. 10 (1981). In either case, the legitimacy of the defendant's discharge of the plaintiff may not be decided on a motion for summary judgment where the plaintiff has made out his prime facie case, and the issues must be submitted to the trier of fact."

[2] The trial transcript reflects that Carson's trial counsel stated:

"I agree with everything you said. The plaintiff—*there are two ways to try one of these cases.* You could do bare bones prima facie, defendant's non-discriminatory reason, here is my additional evidence. Or you can put all your evidence in during the plaintiff's case in chief.

THE COURT: Right.

MR. POTTER: Right. And then listen to the defendant's non-discriminatory reason.

THE COURT: Umhum." (J.A. 431-432, emphasis added)

As the Third Circuit reasoned:

> "Plaintiff was not required to present rebuttal evidence if his case in chief included evidence sufficient to justify the jury in not accepting defendant's contentions. There is simply no requirement that a plaintiff bifurcate a case under the ADEA, although he may desire to do so. Further, in an ADEA case, as in any lawsuit, a jury is entitled to draw reasonable inferences from the evidence notwithstanding the fact that an opposing party has presented direct contrary evidence." (A-6, 7)

B.

The Evidence On The Entire Record Supports The Jury Verdict In Lacey's Favor.

Carson's entire argument is premised on the need, in an age discrimination case, for "some independent evidence to refute the employer's business rationale" (Petition for Writ of Certiorari, hereafter referred to as "Petition", 20); an employee's requirement "to create an issue of fact out of the employer's reasons" (Petition, 20) and to "produce affirmative evidence of age discrimination" (Petition, 22); and proof of "pretext through a preponderance of the evidence by specifically showing or at least contesting that the underlying facts of the employer's explanation are a cover for discrimination" (Petition, 23, 37). In the instant case, Lacey did present such independent evidence; he did create a factual issue from Carson's stated reasons; he did produce affirmative evidence of age discrimination; and he did prove pretext through a preponderance of the evidence. And the jury so found.

Then, the District Court held:

> ". . . we conclude that viewing the evidence in a light most favorable to the plaintiff there is no basis on which to grant defendant's motion for judgment n.o.v." (Appendix to Petition, hereafter referred to as "A", 20)

Subsequently, the Third Circuit affirmed this holding (A, 9).

A review of the evidence, as a whole and in the light most favorable to Lacey[3], clearly supports the jury verdict.

Under 29 U.S.C. § 623(a), "it shall be unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual . . . because of [his] age." Here, there is ample evidence to support the jury's finding that Carson intentionally discriminated against Lacey on the basis of his age.

In each year, from 1976 through 1980, Lacey exceeded the annual sales quotas set by the company (J.A., 60-62, 110, 345); this was accomplished in spite of what Carson recognized as tough economic times in the Pittsburgh area (J.A., 492). In 1980, he led the Western Pennsylvania sales staff (J.A., 652); for the entire company, he ranked eighth in his category of twenty-two salesmen (J.A., 71-72, 75). In December, 1980, at Carson's awards dinner, Lacey was presented with a plaque for achieving a million dollars in sales, his "outstanding sales ability" and his "notable contribution" to Carson's growth (J.A., 64); in January, 1981, Carson presented Lacey with a ring for his sales achievements (J.A., 65-66).

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[3] The standard for reviewing the denial of a motion for judgment notwithstanding the verdict is as follows:

> "We are required to 'review the record . . . in the light most favorable to the non-moving party, . . . and to affirm the judgment of the district court denying the motions unless the record is critically deficient of that minimum quantum of evidence from which the jury might reasonably afford relief.'" *Black v. Stephens*, 662 F.2d 181, 187 (3d Cir. 1981)
>
> "[C]onflicting evidence which could reasonably lead to inconsistent conclusions will not justify a judgment notwithstanding the verdict or a directed verdict . . . It is the function of the trier of fact alone, the jury in this instance,

(Continued on following page)

On February 10, 1981, Lacey sustained a back injury on the job, and he was unable to work again until April 6, 1981. During that period, he was disabled and on workman's compensation; when he returned, he was restricted to "light duty" (J.A., 63, 85, 88-90, 163, 622-624). On May 16, 1981, Lacey was fired at the age of 63, supposedly for poor sales performance. His replacement, Mr. Burdon, was 20 years younger and a salaried employee; Burdon was eventually replaced by one Mr. Porter, who was 28 years of age and also on salary.

The evidence, when viewed in its entirety and in the light most favorable to the verdict winner, clearly demonstrates that Carson's articulated reason for firing Lacey was pretextual.

Due to his disability leave, Lacey did not have sufficient time to work in 1981, before being fired. Nonetheless, despite only working approximately 2½ months (or 81 days) in 1981, he had made sales totaling $394,113.08, which represents 30% of his annual quota and 70% of his year-to-date quota at the time of his termination. It is noted, at that time, the district's top producer was at 72% of year-to-date quota, and the third highest producer was at 50% of year-to-date quota; both of these individuals had worked full time in 1981. However, only Lacey was fired. (J.A., 86-87, 696-697).

(Continued from previous page)

to evaluate contradictory evidence and to draw inferences therefrom." *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. 1976).

"The . . . motion [for judgment n.o v.] requires a judge to determine whether the evidence and justifiable inferences most favorable to the prevailing party afford *any rational basis* for the verdict." *Zegan v. Central Railroad Co. of New Jersey*, 266 F.2d 101 (3d Cir. 1959); emphasis added.

There is clearly a "rational basis" for the verdict in Lacey's favor. His evidence and the reasonable inferences therefrom support the jury's finding.

There is not one shred of tangible evidence, e.g., memos, performance data or other company records, to reflect any dissatisfaction with Lacey's performance. There are no written reprimands or criticisms, and he had never been threatened with firing (J.A., 137-139, 372, 401, 620-621). Moreover, Lacey was not terminated in compliance with company policy. Specifically, the company had no written disciplinary memorandum; he was not afforded the required corrective interviews or warning interview (J.A., 97-98, 130, 365, 608, 660-661). On the contrary, the records which do exist are complimentary.

Lacey showed that Carson realized certain economic gains in firing him and other older employees. In hiring new and much younger salesmen on a salary basis, while replacing older salesmen who were compensated on a commission basis, it is inferred that the company made more money per sale. Here, as in *Dace v. A.C.F. Industries, Inc.*, 722 F.2d 374 (8th Cir. 1983), Lacey presented specific evidence by which the jury could find that the company fired him to save money, and linked that evidence to the alleged discrimination. On this basis, the jury reasonably concluded that there indeed had been a violation of ADEA.

In addition to Carson saving money by terminating Lacey and replacing him with salaried employees who earned less, the company also did not have to pay Lacey's unvested pension benefits. In fact, between 1974 and 1981, none of the Pittsburgh area salesmen went on pension (J.A., 130). This proved that there was a distinct difference in terms of company expenses between the "cost" for Lacey's services and that of the newly hired, younger employees—a difference inuring to the company's considerable benefit.

The company's attitude and views toward the older salesmen is reflected in comments by a former national sales manager to the Pittsburgh district's carpet sales manager (who left in the Spring of 1979). The Pittsburgh manager was "taken to task" for having a sales force of "over-the-hill, retreaded, has-beens" (J.A., 250-251, 261-262).

Further evidence that the company's stated reason for Lacey's firing was a mere pretext centers around Carson's averment that Lacey did not sell enough display rack and automatic sampling programs. Considering his overall sales performances, such an averment is shallow, even if true. But, it is not--witness Lacey's placement of these programs (J.A., 77-78, 217-218), and the company's written expression to him in late January 1981 that it was pleased with his progress (J.A. 138-139). Another asserted reason as grounds for firing Lacey—lack of expansion of commercial accounts—was contradicted by Hahn Furniture Store's carpet manager who testified that Lacey called on him frequently and served him well (J.A., 236-240).

Lacey's sales performance itself, as well as how it compared to that of his successors, is the most significant proof that the company's stated reason was pretextual. Having consistently exceeded his quota[4] from 1976 to 1980, and being commended for it, rebuts any Carson "belief" that he had not developed his territory. See *Berndt v. Kaiser-Aluminum & Chemical Sales, Inc.*, 789 F.2d 253, 258-259 (3d Cir. 1986). Furthermore, Lacey's successor, Mr. Burden, sold *less* in 1982 (after over one and one-half

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[4] All quotas were established by Carson's headquarters; salesmen were advised in writing (J.A., 71). Even trial counsel for Carson referred to the "quota assigned to you" (see e.g., J.A. 222).

years on the job) than Lacey did in 1980; and Burdon did not equal Lacey's 1980 sales until he worked three and one-half years for Carson (J.A., 306, 320). Despite this, Carson felt Burdon was "performing admirably" (J.A., 394-397, 571).[5]

In sum, there is more than adequate evidence in the record to enable the jury to have found that age was a "determinative factor" in Carson's decision to terminate Lacey. Obviously, the jury did not believe he was fired due to concern over his performance; rather, the proof showed that it was in the company's interest to eliminate older employees. Lacey demonstrated that " . . . a discriminatory reason more likely motivated the employer . . ." *Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. at 256.

III.

BECAUSE CARSON DID NOT REQUEST THE TRIAL JUDGE TO MAKE AN EQUITABLE DETERMINATION CONCERNING "FRONT PAY", AND BECAUSE CARSON DID NOT OBJECT TO THE JURY INSTRUCTIONS ON THIS POINT, THE ISSUE HAS BEEN WAIVED. REGARDLESS, THE JURY'S AWARD OF FUTURE LOST EARNINGS IS CLEARLY SUPPORTED BY THE EVIDENCE.

Consistent with *Maxfield v. Sinclair International,* 766 F.2d 788 (3d Cir. 1985), the district court instructed the jurors that if they found Carson to be liable, i.e., if Lacey's age was shown to have been a determinative factor in his termination, then on the issue of damages Lacey would be entitled to

> "wages and certain benefits [he] would have received from the date the Defendant discharged him to the

[5] This evidence was highlighted by the district court in explaining why the case was to be decided by the jury (J.A., 435-436).

> date of this trial, and future wages to age 70." (J.A., 473)

Carson did not object to these instructions.

The clear language of *Maxfield* unequivocally confirms that the "amount of damages available as front pay is a jury question." *Id.* at 796. Despite this, Carson now argues that the award of "front pay" to Lacey is an equitable determination for a judge. Carson did not request the trial judge to make such a determination; nor did Carson object to the jury instructions on this point (quoted above). Therefore, *it has waived this issue* and cannot now complain about the result.

Carson also argues that, in general, a front pay award is speculative. However,

> "an award for future lost earnings is no more speculative than awards for lost earning capability routinely made in personal injury and other types of cases." *Id.*

Also,

> "the plaintiff's duty to mitigate damages should serve as an effective control on justified damage awards." *Id.*

Specifically, in the instant case, the award of front pay is not speculative at all, but clearly supported by the evidence, which shows a *pattern of past increases* enjoyed by Lacey, and a *strong likelihood of similar increases continuing* had Lacey remained in Carson's employ.

The evidence at trial disclosed that Lacey exceeded his quota each year from 1976 through 1980 (J.A., 60-62, 110). From 1976 through 1981, there was at least a 9% increase in his sales quota in each successive year (J.A., 86, 114-115), and as mentioned Lacey exceeded each one of them. His projection of lost earnings was from 1981, at the point of termination, through 1988, when Mr. Lacey

will reach the age of 70, which is the company's mandatory retirement age. Lacey based his request for "front pay" only upon his former earnings history. There were no projections which required expert testimony. It was undisputed that Lacey had exceeded his sales quota for each year of his employment. In 1980, his quota was 9% over that of 1979; in 1981, his quota was 9% over that of 1980 (see Plaintiff's Exhibits 17 and 18, J.A., 749-761). His future lost earnings were projected "only upon [this] former earnings history".

Front pay is appropriate when a firing precludes reentry into the workforce, or when there has been deliberate discrimination. Here, both conditions existed. First, due to Lacey's age and the lack of available positions in the industry, not to mention the stigma attached to a "firing", reentry into the workforce was effectively precluded. Second, the evidence discloses Carson's deliberate discrimination against Lacey because of his age.

It is also noted "front pay" is the only appropriate relief under the circumstances. No evidence was presented to show that a position was available for Lacey. And, the relationship between Lacey and Carson was so damaged that reinstatement would not be feasible.[6]

Carson makes a back-door effort to undermine the jury verdict and the district court order denying the post-trial motion. The jurors were correctly instructed on mitigation and on the circumstances under which front pay is fitting. Carson did not request the trial judge to make an equitable determination; nor did Carson object to the jury instructions. Based on applicable standards,

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[6] That reinstatement was ill-suited to this case is also confirmed by Carson's having three times denied Lacey's request for reinstatement. (J.A. 110)

the award of front pay is proper and clearly supported by the evidence.

IV.

BECAUSE CARSON DID NOT OBJECT TO THE JURY INSTRUCTIONS CONCERNING MITIGATION, THIS ISSUE HAS BEEN WAIVED. REGARDLESS, THE JURY'S DETERMINATION THAT LACEY DID NOT FAIL TO MITIGATE DAMAGES IS CLEARLY SUPPORTED BY THE EVIDENCE.

The district court instructed the jury as follows:

"If you find that the Defendant unlawfully discharged the Plaintiff because of his age, the Plaintiff is entitled to damages consisting of the wages and certain benefits he would have received if the Defendant had not unlawfully and improperly discharged him. This consists of wages and certain employee benefits Plaintiff would have received from the date the Defendant discharged him to the date of this trial and future wages to age 70. From that amount, you should subtract the amount of wages or earnings he received from other jobs during the same period. And, if you find that the Defendant has proved by a fair preponderance of the evidence that Plaintiff unjustifiably failed to take a new job or the like, or a job of like status and pay, which was available to him, or failed to make reasonable efforts to find a new job, you should subtract from Plaintiff's damages any amount he could have earned in a new job after his discharge.

. . .

The purpose of the Age Discrimination in Employment Act is to make persons whole for injuries suffered as a result of unlawful employment discrimination under the Age Discrimination in Employment Act. A successful Plaintiff is entitled to recover lost wages and benefits, including increases in wages. The amount of wages and benefits due is determined by calculating the amount that would have been earned from the date of the adverse action, the date of the

> firing, to the date up to age 70, if you find that the Plaintiff otherwise would have been employed. You must subtract any wages the Plaintiff received from any other employment or would have received had he made reasonable efforts to obtain such employment.
>
> . . .
>
> In considering the damages you award the Plaintiff, you must remember, as I have indicated, that Plaintiff has a duty to mitigate his damages; that is, to take advantage of any reasonable opportunity he may have, under the circumstances, to reduce or minimize his loss or damage.
>
> The Defendant bears the burden to prove that the Plaintiff failed to mitigate damages. The Defendant must show by a fair preponderance of the evidence that there were suitable positions available Plaintiff could have obtained, and that Plaintiff failed to use reasonable care in seeking those opportunities out. A suitable position is one which is consummate with the Plaintiff's particular skills, background, and experience.
>
> If you should find from a preponderance of the evidence that the Plaintiff failed to use reasonable care or due diligence in seeking out any employment opportunity that was reasonably available to him under all the circumstances, then you should reduce the amount of damages by the amount he reasonably could have acquired if he had taken advantage of these employment opportunities." (J.A., 473-476)

Carson did not object to these instructions on a timely basis in accordance with Rule 51 of the Federal Rules of Civil Procedure. Carson argues that the jury should not have been permitted to award any back pay or front pay after 1981 (Petition 52-54).[7] But, at trial, Carson did not object to the district court telling the jury it could calculate damages to 1988. Therefore, *the issue was not prop-*

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[7] In the Third Circuit, Carson argued that Lacey should not have been awarded back pay or front pay after *1983* (Brief for Appellant, p.44).

erly preserved for review; it has been waived and Carson cannot now complain of the result.

Furthermore, the jury rejected the notion that Lacey failed to mitigate damages, and there is no persuasive argument for setting aside its decision. The Third Circuit did not apply an incorrect standard or review this case in a manner which conflicts with that of other Circuits. The Court simply held:

> "We see no merit to defendant's contention that plaintiff failed to mitigate damages and thus is barred from relief for there was evidence that plaintiff attempted to find other employment but was unsuccessful. The jury obviously accepted plaintiff's testimony in this regard and we have no reason to reject these findings." (A-7)

Mitigation is a question for the jury. The burden is on the defendant (Carson) "to demonstrate *both* that plaintiff (Lacey) failed to exercise reasonable diligence to mitigate his damages, *and* that there was a reasonable likelihood that plaintiff might have found comparable work if he had exercised reasonable diligence." *Wehr v. Burroughs Corp.*, 619 F.2d 276, 278, n.3 (3d Cir. 1980) (emphasis added). The duty to mitigate, however, does not *obligate* a plaintiff to accept a position that " 'is not consonant with his particular skills, background and experience' or 'which involves conditions that are substantially more onerous than his previous position.' " *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231, 73 L.Ed.2d 721, 732, n.16 (quoting *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307 (D.C. Cir. 1972)).

The burden of proving "failure to mitigate" is on Carson. In that regard, Carson must have shown

> ". . . by a fair preponderance of the evidence that there were suitable positions available [Lacey] could have obtained, and that [he] failed to use reasonable

> care in seeking those opportunities out. A suitable position is one which is consummate with the plaintiff's particular skills, background and experience." (J.A., 475)

In examining the record, it is plain that Carson did not make such a showing.

Viewed in the light most favorable to Lacey, the verdict winner,[8] the evidence pertaining to his efforts to obtain employment are summarized[9] as follows:

1) Lacey made telephone calls to several carpet manufacturers; he had one interview, but was not offered the job (J.A., 108);

2) he frequently approached the local distributors; he was told repeatedly that there were no available positions (J.A., 108, 174, 230, 280);

3) Lacey subscribed to two trade journals and consistently reviewed the classified sections (J.A., 109);

4) he called upon every one of the important local accounts which he serviced while at Carson—they could not tell him of anyone who was hiring (J.A., 109);

5) Lacey sought to have Carson reinstate him to his former sales position on three different occasions (J.A., 110);

6) an acquaintance in the carpeting business looked for work for Lacey, but he was unsuccessful (J.A., 231).

Lacey looked for work from all available sources. He inquired of employment possibilities as far as Atlanta, Georgia (even though a wrongfully discharged employee need not accept, in mitigation of damages, employment

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[8] As it has throughout its petition, Carson ignores the basic law which requires this Court and the parties to this appeal to view the evidence in the light most favorable to Lacey, Carson's analysis is flawed by its own insistence that only the evidence which favors its position be considered.

[9] See a more detailed recitation of the facts concerning mitigation in the foregoing Statement of Case, *supra*.

which is located an unreasonable distance from his home; see *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114, 119 (4th Cir. 1983)). Also, he looked for work after he began receiving Social Security benefits (J.A., 184, 233-234).

William Pratt, from the Graffam Flooring Company, testified that a man of Lacey's qualifications was unique in the carpet sales business, and that carpet distributors in Western Pennsylvania had beeen going out of business in the late 1970s and continuing up to the time of trial. Pratt's company had not hired a salesman in Lacey's category from the time of Lacey's dismissal to the time of trial.

It was also proven during the course of trial that Allegheny County in Western Pennsylvania was a depressed economic area during the applicable time period, and employment possibilities in general were lacking (J.A., 110, 281). Additionally, Lacey's age (J.A., 108, 231) and the stigma of having been fired made finding a job extremely difficult. Eventually, after his continued and long term efforts proved fruitless, he looked no further.

Concerning the second requirement to be met by Carson, there is no evidence that "there was a reasonable likelihood that [a person in Lacey's circumstances] might have found comparable work. . . ." *Wehr v. Burroughs Corp., supra.*

CONCLUSION

Based upon the reasons stated above and the record as a whole, the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,
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